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No. 98 464

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1998

TOWN OF TRENTON,
Petitioner,

v.

LOUNGE MANAGEMENT, LTD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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100 pp

QUESTION PRESENTED

1. Whether the Supreme Court of Wisconsin erred in finding the Town of Trenton's anti-nudity ordinance to be overbroad, in violation of the First Amendment to the United States Constitution, while refusing to apply an available and limiting construction of the ordinance that would have cured any substantial overbreadth?

2. Whether 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996) is controlling case law in cases involving ordinances that ban public nudity in establishments licensed to sell alcohol?

3. How are cases that are a plurality decision, as compared to a majority decision, to be interpreted?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings in the Supreme Court of Wisconsin, in Case No. 96-1853, __Wis.2d.__, 580 N.W.2d 156 (1998), listed in the caption:

Town of Trenton

Lounge Management, Ltd.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS DELIVERED BELOW 2

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED ... 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 13

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: **Page**

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996) i,6,7,8,13,14,16,18

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 6,8,9,13,14,15,16

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 9,10,13,17

California v. LaRue, 409 U.S. 109 (1972) 7,8,14

City of Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988) 10

City of Milwaukee v. Wroten, 160 Wis.2d 207, 466 N.W.2d 861 (1991) 10

City of Newport v. Iacobucci, 479 U.S. 92 (1994) . 5,6

Fond du Lac County v. Mentzel, 195 Wis.2d 313, 536 N.W.2d 160 (Ct. App. 1995) 6

Page

Lounge Management, Ltd. v. Town of Trenton, __ Wis.2d. __, 580 N.W.2d. 156 (1998) 2,6,8,9,10,11,12,13,15,16

Marks v. United States, 430 U.S. 188 (1977) 15

New York v. Ferber, 458 U.S. 747 (1982) 13,17

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 7

Schultz v. City of Cumberland, 195 Wis.2d 554, 536 N.W.2d 192 (Ct. App. 1995) 5,6

State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994) 6,9

United States v. O'Brien, 391 U.S. 367 (1968) 7,8,9,14,15,16

Young v. American Mini Theatres, Inc. 427 U.S. 50 (1976) 14

STATUTES:

28 U.S.C. § 1257(a) 2

Wis. Stats. §125.10 3,4,12

Page

Wis. Stats. §125.12 3

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1998

No. _____

TOWN OF TRENTON,
Petitioner,

v.

LOUNGE MANAGEMENT, LTD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Petitioner, Town of Trenton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Wisconsin, entered June 18, 1998.

OPINIONS DELIVERED BELOW

The opinion of the Supreme Court of Wisconsin, with the dissenting opinion of Justice Steinmetz and Justice Wilcox, (App. A), is reported in Lounge Management, Ltd. v. Town of Trenton, __ Wis.2d. __, 580 N.W.2d. 156 (1998). The "Certification by Court of Appeals of Wisconsin," (App. B), is not officially reported. The "Findings, Order, and Judgment," (App.C), issued May 14, 1996 is included.

JURISDICTION

The date on which the Supreme Court of Wisconsin decided this matter was June 18, 1998. A copy of the decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provision, Town of Trenton, Ordinance No. 10 (the "Ordinance"), is reproduced in Appendix D, as is the Wis. Stats. § 125.10 (App. E), and Wis. Stats § 125.12 (App. F).

STATEMENT OF THE CASE

The Town of Trenton is located in Pierce County Wisconsin. It is an extensively rural community. The Town Board of supervisors passed Town of Trenton, Ordinance No. 10 (the "Ordinance") on April 9, 1992 (App D). The Ordinance became effective April 15, 1992. The Ordinance provided, "*There shall be no public nudity at a public licensed establishment.*"

The Ordinance was enacted pursuant to the Wisconsin Statutes, including Wis. Stats. § 125.10 (App. E). Wis. Stats. § 125.10 states, in part:

> Any municipality may enact regulations incorporating any part of this chapter (relating to alcohol beverages) and may prescribe additional regulations for the sale of alcohol beverages, not in conflict with this chapter.

The Ordinance specifically defined "Nudity"[1] and "Public."[2] The Ordinance also listed two "exceptions."[3]

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[1] Nudity means the showing or exposing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or of the female breast with less than a fully opaque covering of any portion thereof below the nipple.

[2] Public means any place of accommodation or amusement, which shall be interpreted broadly to include, but not limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns and any place where accommodations, amusement, goods or services are available either free or for a consideration. Campgrounds are also included.

[3] Exceptions.

A. This ordinance is not to be interpreted as restricting the proper use of a bathroom facility by a male or a female in an enclosed area where the person is of the same sex designated for such room, and is not engaged in for any sexual or exhibitionist purpose to or in front of or adjacent to other persons.

B. This ordinance is not to be interpreted to prevent activities in rooms privately rented in a hotel, motel, resort, or camper if at a campground, if the person(s) involved rented such private facility or owns it and has not invited or allowed members of the public, who are not immediate family members, to be at such location.

The Town of Trenton Board of Supervisors approved a Class B liquor license for the Respondent, Lounge Management, Ltd. (hereinafter "Lounge Management"), January 9, 1996. The license was issued January 10, 1996. The Respondents operated a tavern known as the "Border Lounge", in Hager City , Wisconsin.

Lounge Management, on January 15, 1996, filed an action in Pierce County, Wisconsin Circuit Court seeking an injunction and declaratory judgment that the Ordinance was null and void. Lounge Management alleged the Ordinance prohibiting nudity on liquor licensed premises was unconstitutional under the Constitution of the United States and the Wisconsin Constitution. The Respondent filed motions for both preliminary and permanent injunctions.

The trial court denied the Respondent's request for a preliminary injunction:

> finding it probable that the Ordinance would be declared a constitutional exercise of the Town's power to regulate nude dancing as a part of the liquor licensing process. In doing so, the circuit court relied upon Schultz v. City of Cumberland, 195 Wis.2d 554, 536 N.W.2d 192 (Ct. App., 1995) (holding municipal ordinance banning nude performances valid because state's delegation of power to regulate sale of alcohol under Twenty-First Amendment included the lesser power to ban sale of liquor in establishments with nude dancing) and City of Newport v. Iacobucci, 479 U.S.

92 (1994). Also anticipating an overbreadth challenge, the circuit court followed State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), and narrowly construed the disputed Ordinance to apply only to establishments with liquor licenses. Lounge Management, Ltd. v. Town of Trenton , ___Wis.2d ___, 580 N.W.2d 156, 158 (1998).

The trial court also noted that the Ordinance might be constitutional, under Barnes v. Glen Theatre, Inc., 501 U.S.560 (1991).

The trial court subsequently entered a declaratory judgment on the constitutionality of the Ordinance and reaffirmed its preliminary holding that the Ordinance, as construed, was constitutional. Id., __Wis.2d__, 580 N.W.2d at 158.

The Respondent appealed, requesting the Wisconsin Court of Appeals to certify the matter to the Supreme Court of Wisconsin. The request was based upon the fact there was potentially conflicting precedent concerning the constitutionality of anti-nudity ordinances. A conflict existed between Fond du Lac County v. Mentzel, 195 Wis.2d 313, 536 N.W.2d 160 (Ct. App. 1995) and Schultz v. City of Cumberland, 195 Wis.2d 554, 536 N.W.2d 192 (Ct. App. 1995)

Both the Petitioner and the Respondent argued at length, in their respective briefs to the Supreme Court of Wisconsin, that 44 Liquormart, Inc. v. Rhode Island, 517

U.S. 484, 116 S.Ct. 1495 (1996), was controlling. The Respondent argued that the case overruled Schultz. The Petitioner, on the other hand, argued the Ordinance was valid on the basis "government may suppress conduct more easily than it may suppress speech," citing 44 Liquormart, 116 S.Ct. at 1512. The basis for the argument being, protection of sexually explicit expression is of less societal importance than the protection of other forms of expression, citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

The Petitioner argued, pursuant to United States v. O'Brien, 391 U.S. 367 (1968), when conduct includes speech and non-speech elements, a sufficiently important governmental interest in regulating the non-speech element justifies incidental limitations on First Amendment freedoms. The Petitioner went on to argue that the "four-part O'Brien test" need be applied.[4]

The Petitioner argued the Ordinance regulates *nudity* and not nude dancing. The Petitioner also argued that the Ordinance is content neutral and is unrelated to the suppression of free expression.

The issue of "overbreadth" was also dealt with by the parties. The Petitioner argued:

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[4] A governmental regulation restricting conduct arguably protected by the First Amendment is justified if: 1) it is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) the interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. at 377.

> 44 Liquormart did not overrule California v. LaRue, 409 U.S. 109 (1972). On the contrary, 44 Liquormart, expressly affirmed the holding in LaRue, apart from any reliance on the Twenty First Amendment. 44 Liquormart v. Rhode Island, 116 S.Ct. 1495, 1514 (1996).

The Petitioner concluded by arguing, the Ordinance prohibiting nudity on licensed premises is constitutional and not overbroad.

The Supreme Court of Wisconsin disagreed. It issued an opinion on June 18, 1998, reversing the trial court. The Supreme Court of Wisconsin (hereinafter the "Court"), found that the Ordinance was overbroad , in violation of the First Amendment to the United States Constitution. No mention was made of 44 Liquormart by the Court in its decision.

The Court noted:

> The substantive questions presented then are whether the Ordinance is unconstitutional on its face, due to overbreadth, or unconstitutional as specifically applied to Lounge Management. Lounge Management, Ltd. v. Town of Trenton, __Wis.2d __, 580 N.W.2d 156, 159 (1998).

The Court examined the Ordinance in light of Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), and United

States v. O'Brien, 391 U.S. 367 (1968). Justice Bradley, for the majority, determined that Justice Souter's concurrence in Barnes was the holding of the Court. Lounge Managemnt, Inc. v. Town of Trenton, 580 N.W.2d at 161. She stated:

> We conduct our overbreadth analysis by inquiring whether the Ordinance is drafted in a manner that addresses the secondary effects of adult entertainment, such as prostitution, sexual assault, and other criminal activity, without also suffocating other protected expression in a real and substantial manner. Id., at 580 N.W.2d at 161.

Both the majority and the dissent agreed that the Ordinance was overbroad, at first glance. Id., at 580 N.W.2d at 164. But, as the dissent noted, "this is where the majority's analysis effectively ends, and where its error begins." Id., 580 N.W.2d.at 164.

As Justice Steinmetz noted:

> The majority makes two fundamental errors. First, the majority refuses to accept an available, limiting construction of Ordinance 10 which would cure any substantial overbreadth. See, State v. Thiel, 183 Wis.2d 505, 522, 515 N.W.2d 847 (1994); see also, Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Second, despite

> controlling case law to the contrary, the majority concludes that the Ordinance's overbreadth is both real and substantial after conceiving of a single impermissible application of that Ordinance. See, City of Milwaukee v. K.F., 145 Wis.2d 24, 40-41, 426 N.W.2d 329 (1988); see also, Broadrick, 413 U.S. at 615-16; City of Milwaukee v. Wroten, 160 Wis.2d 207, 226-27, 466 N.W.2d 861 (1991).

Id. at 164.

The Court found that there was no distinction between animate and inanimate nudity, under the Ordinance. The Court found that the Ordinance did not limit its application to establishments that sold alcohol, but applied to "all publically licensed establishments." The Court refused to strike portions of the Ordinance, in an attempt to reduce its scope. The Court refused to engage in "judicial legislation."

Justice Steinmetz, writing for the dissent, acknowledged the Ordinance was overbroad, but notes the majority refuses to:

> accept an available, limiting construction of Ordinance 10 which would cure any substantial overbreadth and . . . despite controlling case law to the contrary, the majority concluded that the Ordinance's overbreadth is both real and substantial after conceiving of a single application of that

ordinance.

Justice Steinmetz was critical of the majority by stating:

> The majority refuse to provide a narrowing construction of the Ordinance, it accepts the broadest possible construction of that ordinance. This court has a duty to interpret an ordinance, as it would a statute, by applying a limiting construction to that ordinance, if one is available, to preserve its constitutionality. (Citation omitted.) Id., 580 N.W.2d at 165.

Justice Steinmetz argued that "the majority's broad construction of Ordinance 10 contravenes the common sense understanding of 'public nudity.'" Id., 580 N.W.2d at 166. He went on to state that the majority was not applying common sense in its reading and application of the Ordinance as applied to animate and inanimate nudity.

The majority gave examples of how the Ordinance could be misapplied to theatrical productions and private activities in hotel and motel rooms. The dissent reminds the majority that the Ordinance is to be applied only to "public licensed establishments." Justice Steinmetz states:

> The majority is correct in stating that the Ordinance does not specifically limit such establishments to places of accommodation or amusement licensed to sell alcohol. To be

consistent with the language and purpose of Ordinance 10, however, the court should construe Ordinance 10 to reach only establishments licensed to sell alcohol. Id., 580 N.W. 2d at 167.

Justice Steinmetz reminded the majority: Ordinance 10 applies only to a "licensed establishment." The only license to which the Ordinance specifically refers is the license to sell alcohol, which the Town is authorized to issue and regulate under Wis. Stat § 125.10.[5] The record does not describe any other type of establishment licensed by the Town of Trenton. In addition, the Town concedes that the purpose of enacting Ordinance 10 was not to protect the community from the secondary effects usually associated with adult entertainment establishments; the purpose was to protect against such secondary effects only as they are enhanced by the sale and consumption of alcohol. That this is the limited purpose of Ordinance 10 is supported by the facts of this case. Id., 580 N.W.2d at 167.

Both the majority and the dissent discuss the matter

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[5] See Appendix E

of "real and substantial" protections, as outlined in New York v. Ferber, 458 U.S. 747 (1982); Broadrick v. Oklahoma, 413 U.S. 601 (1973); and Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

The Court ruled that the Ordinance was overbroad, "in violation of the First Amendment to the United States Constitution." Lounge Management, Ltd. v. Town of Trenton, __Wis.2d __, 580 N.W.2d 156, 157.

REASONS FOR GRANTING THE WRIT

This case raises important issues of statutory and regulatory construction. The decision of the Supreme Court of Wisconsin is in conflict with the ruling of the United States Supreme Court, in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996). The Supreme Court of Wisconsin found that the Ordinance violated The United States Constitution alone.

The Ordinance had been drafted in conformity with Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). The actions of the Supreme Court of Wisconsin will result in a chilling effect upon townships and municipalities accross the County, in their effort to combat the secondary effects

usually associated with adult entertainment, as enhanced by the sale or consumption of alcohol.

44 Liquormart dealt with printed commercial speech and not nudity. The challenged statute concerned liquor advertising. Thus, the Court considered the relationship between First Amendment rights and the State's authority to control liquor under the Twenty-First Amendment. This relationship between the First Amendment and the Twenty-First Amendment had been previously addressed in California v. LaRue, 409 U.S. 109 (1972), and subsequent cases, involving regulation of nudity on premises for the sale of liquor. The United States Supreme Court took great pains to affirm the LaRue result, *i.e.* that a rule prohibiting nudity on licensed premises is constitutional and not overbroad. 44 Liquormart, Inc. v. Rhode Island , 116 S.Ct., at 1514; California v. LaRue, 409 U.S. 109, 117-119 (1972).

Furthermore, 44 Liquormart provides the legal framework for affirming the constitutionality of such ordinances apart from the Twenty-First Amendment by citing Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The express affirmation of LaRue and Barnes makes it clear that 44 Liquormart is not to be interpreted to invalidate ordinances prohibiting nudity on licensed premises.

Under 44 Liquormart, LaRue, and Barnes, the legal standard for analyzing regulations restricting public nudity is as outlined in United States v. O'Brien, 391 U.S. 367 (1968), and the result of applying that standard is that an ordinance prohibiting nudity in licensed premises is constitutional.

The question of the true meaning of Barnes needs to be addressed. As noted by the Supreme Court of Wisconsin, Barnes is a plurality opinion. Lounge Management, Ltd. v. Town Trenton, __ Wis.2d __,580 N.W.2d 156, 160 (1998).

This Court needs to clarify how lower courts are to interpret "fractured opinions." The Wisconsin Court, citing Marks v. United States, 430 U.S. 188 (1977), stated,

> that when the Court issues a splintered plurality decision, courts interpreting that decision should regard the opinion of the Justice concurring on the "narrowest grounds" as the Court's ultimate holding. Lounge Management, Ltd. v. Town Trenton, __ Wis.2d __, 580 N.W.2d 156, 160 (1998).

The Wisconsin Court has applied Justice Souter's concurrence, as the holding. Justice Souter applies the four-part test outlined in United States v. O'Brien, 391 U.S.367 (1968).

> A government may infringe First Amendment freedoms to regulate conduct so long as: (1) the targeted conduct falls within the domain of state regulatory power; (2) the statutory scheme advances important or substantial government interests; (3) the state's regulatory efforts are unrelated to the suppression of free expression; and (4) the regulations are narrowly tailored. Lounge Management, Ltd. v. Town Trenton, __ Wis.2d __, 580 N.W.2d 156, 159 (1998),

citing United States v. O'Brien, 391 U.S. at 376 -377 (1968).

The Supreme Court of Wisconsin looked at the various hypothetical situations, as discussed by Justice Souter in Barnes. The Wisconsin Court was too narrow in its analysis, as noted by Justice Steinmetz, for the dissent. By failing to consider the ruling in 44 Liquormart, the Wisconsin Court has committed serious error that has wide reaching effects beyond the boundaries of the Town of Trenton or the State of Wisconsin.

The Wisconsin Court has expanded the definition of public nudity to encompass not only exotic dancing, but also the display of nude statues and a display of nudity on a television screen in the a "licensed establishment." Lounge Management, Ltd. v. Town of Trenton, __Wis.2d __, 580 N.W.2d 156, 161 (1998).

The Wisconsin Court was incomplete in its analysis, by failing to apply all four of the O'Brien standards. They, unlike Justice Souter in Barnes, failed to examine the Ordinance to determine if "the statutory scheme advances important or substantial governmental interests." United States v. O'Brien, 391 U.S. at 376.

This decision has great importance to rural communities across the country. Hager City, Wisconsin, is not New York City, or for that matter, Madison, Wisconsin. It is a rural community. The Ordinance has no application, whatsoever to theaters or art galleries. It applies to "licensed establishments." In the plain meaning of the Ordinance - liquor licensed establishments.

The Supreme Court, in New York v. Ferber, 458 U.S. 747 (1982), stated:

> The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face. Ferber, 458 U.S. 747, 770 (1982).

The "strong medicine" has now been dispensed to the Town of Trenton and other townships with similar ordinances. Within days of the decision, the Village of Somerset, Wisconsin withdrew its Ordinance, also banning nudity in licensed establishments. There are now both male and female dancers "performing" in Somerset. By deciding the case solely on the basis of the First Amendment to the United States Constitution, the case will be cited by parties in other states as an example of how their state should rule.

CONCLUSION

The Supreme Court of Wisconsin committed error by finding Town of Trenton, Ordinance 10 unconstitutional, on the basis of being "overbroad." The Court refused to apply a limiting construction and merely stuck the Ordinance in its entirety. The "common sense" approach to the Ordinance would have been to thoroughly review the record and apply the Ordinance to only "licensed establishments" selling liquor.

The United States Supreme Court needs to clarify for the lower courts and the practitioner how a "plurality decision" is to be interpreted and applied.

This Court needs to clarify whether 44 Liquormart, Inc. v. Rhode Island is applicable to cases involving ordinances banning nudity on licensed premises.

Respectfully submitted,

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INDEX TO APPENDICES

Page

APPENDIX A :
Opinion of the Supreme Court of Wisconsin, Lounge Management, Ltd. v. Town of Trenton, 96-1853, __Wis.2d. __, 580 N.W.2d 156(1998) 1.1

APPENDIX B:
Certification by Court of Appeals of Wisconsin, Lounge Management, Ltd. v. Town of Trenton, 96-1853 ..... 2.1

APPENDIX C:
Findings, Order, and Judgment, Pierce County Circuit Court, Wisconsin, Case No. 96-CV-8 .. 3.1

APPENDIX D:
Town of Trenton, Ordinance No. 10, April 9, 1992 ..... 4.1

APPENDIX E:
Wisconsin Statutes § 125.10 ..... 5.1

APPENDIX F:
Wisconsin Statutes § 125.12 ..... 6.1

APPENDIX A

LOUNGE MANAGEMENT, LTD. v
TOWN OF TRENTON,

___ Wis.2d ___ 580 N.W.2d 156 (1998)

LOUNGE MANAGEMENT, LTD,
PLAINTIFF-APPELLANT,

v.

TOWN OF TRENTON,
DEFENDANT-RESPONDENT.

SUPREME COURT OF WISCONSIN
Case No.: 96-1853
Submitted on Briefs
Oral Argument: December 3, 1997
Opinion Filed: June 18, 1998

APPEAL from a judgment of the Circuit Court for Pierce County, Robert W. Wing, Judge. Reversed.

For the plaintiff-appellant there were briefs by Matthew A. Biegert and Doar, Drill & Skow, S.C., New

Richmond and Randall D.B. Tigue and Randall Tigue Law Offices, P.A., Minneapolis, MN and oral argument by Randall D.B. Tigue.

For the defendant-respondent there was a brief by Catherine R. Quiggle and Rodli, Beskar, Boles & Krueger, S.C., River Falls and oral argument by Catherine R. Quiggle.

Steinmetz, J., dissented, and Wilcox, J., joins.

¶ 1. ANN WALSH BRADLEY, J.

This case is before the court on certification by the court of appeals, pursuant to Wis. Stat. § (Rule) 809.61 (1995-96).[fn1] The plaintiff, Lounge Management, Ltd. ("Lounge Management"), appeals from a circuit court order[fn2] denying injunctive relief and from a declaratory judgment upholding the constitutionality of an anti-public nudity ordinance. Lounge Management contends that the disputed ordinance is facially overbroad as well as unconstitutional as applied. Because we find the anti-public nudity ordinance to be overbroad, in violation of the First Amendment to the United States Constitution, we reverse the judgment of the circuit court.

¶ 2. Lounge Management operates a nightclub in rural Town of Trenton (the "Town"), in Pierce County, pursuant to a Class B liquor license. On the date Lounge

Management obtained its liquor license, the Town maintained an existing ordinance banning public nudity in "licensed establishments," (the "Ordinance").[fn3] Five days after the Town Board approved Lounge Management's liquor license, Lounge Management decided to offer nude and semi-nude dancing at its facility. It filed suit requesting temporary and permanent injunctions against the Town, prohibiting the Town from enforcing the Ordinance. Lounge Management also sought a judgment pursuant to 42 U.S.C. § 1983 (1994) declaring the Ordinance void under the First Amendment to the United States Constitution, and Art. I, § 3 of the Wisconsin Constitution.[fn4] The Town answered by asserting the constitutionality of the Ordinance, and later amended its answer to allege that Lounge Management's suit was brought in violation of the notice of claim requirements of Wis. Stat. § 893.80.

¶ 3. The circuit court denied Lounge Management's request for a preliminary injunction, finding it probable that the Ordinance would be declared a constitutional exercise of the Town's power to regulate nude dancing as part of the liquor licensing process. In doing so, the circuit court relied upon *Schultz v. City of Cumberland*, 195 Wis.2d 554, 536 N.W.2d 192 (Ct. App. 1995) (holding municipal ordinance banning nude performances valid because state's delegation of power to regulate sale of alcohol under Twenty-first Amendment included the lesser power to ban sale of liquor in establishments with nude dancing) and *City of Newport*

v. Iacobucci, 479 U.S. 92 (1986) (same). Also anticipating an overbreadth challenge, the circuit court followed *State v. Thiel*, 183 Wis.2d 505, 515 N.W.2d 847 (1994), and narrowly construed the disputed Ordinance to apply only to establishments with liquor licenses. The Town then filed a motion to dismiss.[fn5]

¶ 4. The circuit court denied the Town's motion to dismiss, ruling that while the notice of claim provisions present in Wis. Stat. § 893.80 applied to Lounge Management's suit, "[f]ailure to comply with the notice requirements of Wis. Stat. § 893.80 is a defense related to personal jurisdiction and is deemed waived by the defendant's failure to raise it in its original answer." The circuit court also entered a declaratory judgment on the constitutionality of the Ordinance and reaffirmed its preliminary holding that the Ordinance, as construed, was constitutional.

¶ 5. Lounge Management appealed the circuit court's decision. Faced with what it viewed as conflicting precedent concerning the constitutionality of anti-public nudity ordinances, *Fond du Lac County v. Mentzel*, 195 Wis.2d 313, 536 N.W.2d 160 (Ct. App. 1995) (finding county ordinance prohibiting nudity of entertainers during performances constitutional as applied, but facially unconstitutional due to overbreadth) and *Schultz*, the court of appeals certified the case to this court.

¶6. Having accepted certification on all issues before the court of appeals, we must first consider the Town's claim that this suit should be dismissed due to Lounge Management's failure to file a notice of claim against the Town pursuant to Wis. Stat. § 893.80.[fn6] We note that the plaintiff challenges the Ordinance both under the federal constitution pursuant to 42 U.S.C. § 1983 and the state constitution. Federal constitutional challenges brought under § 1983 cannot be barred by Wisconsin's notice of claim requirement. *See Felder v. Casey*, 487 U.S. 131 (1988) (holding application of state notice of claim provision preempted by federal civil rights claim). Accordingly, we proceed to consider Lounge Management's constitutional challenge to the Ordinance under the First Amendment.[fn7]

¶7. The substantive questions presented then are whether the Ordinance is unconstitutional on its face, due to overbreadth, or unconstitutional as specifically applied to Lounge Management. Both inquiries implicate the First Amendment to the United States Constitution. Such constitutional challenges are questions of law which we review de novo. *See Association of State Prosecutors v. Milwaukee County*, 199 Wis.2d 549, 557, 544 N.W.2d 888 (1996).

¶8. Statutes and ordinances normally are the beneficiaries of a presumption of constitutionality which the attacker must refute. *See State v. Holmes*, 106 Wis.2d 31,

41, 315 N.W.2d 703 (1982). However, where an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 658 (1981); *Thiel*, 183 Wis.2d at 523; *City of Madison v. Baumann*, 162 Wis.2d 660, 669, 470 N.W.2d 296 (1991).

¶9. Nude dancing has been acknowledged to include an expressive element, and accordingly is entitled to at least some degree of constitutional protection. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991); Id. at 581 (Souter, J., concurring); Id. at 587 (White, J., dissenting). However, it is also a recognized constitutional principle that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

¶10. In such instances, the government may infringe upon First Amendment freedoms to regulate conduct so long as: (1) the targeted conduct falls within the domain of state regulatory power; (2) the statutory scheme advances important or substantial government interests; (3) the state's regulatory efforts are unrelated to the suppression of free expression; and (4) the regulations are narrowly tailored.

See O'Brien, 391 U.S. at 376-77. The United States Supreme Court has splintered, however, over the permissible manner in which the government may reasonably regulate the protected expression inherent in nude dancing.

¶ 11. In *Barnes*, a plurality of the court applied the *O'Brien* test, but disagreed among themselves over the requisite important or substantial interest that the state needed to show under *O'Brien* when infringing on First Amendment expression. Three Justices, lead by Chief Justice Rehnquist, believed that the state could regulate expressive conduct to promote "public morality" based on its police powers. *See Barnes*, 501 U.S. at 568. Justice Souter, in concurrence, disagreed, but concluded that the state could regulate conduct implicating expression to combat the "secondary effects" that shadow establishments where public nudity occurs, such as prostitution, sexual assault, and other criminal activity. *See* Id. at 582-83 (Souter, J., concurring).

¶ 12. Lounge Management's primary argument is that the Ordinance is so overbroad that it applies to conduct which the state is not entitled to regulate. In order to establish the framework of our overbreadth analysis of the Ordinance, we first must distill the holding of the Court in *Barnes*. If Chief Justice Rehnquist's view is the holding, we must evaluate the reach of the Ordinance in promoting public morality. If Justice Souter's concurrence is the holding, we

must question whether the Ordinance is narrowly tailored to address only the secondary effects associated with public nudity in licensed establishments.

¶ 13. Recognizing the potential precedential problems inherent in fractured opinions, the United States Supreme Court held in *Marks v. United States*, 430 U.S. 188, 193 (1977), that when the Court issues a splintered plurality decision, courts interpreting that decision should regard the opinion of the Justice concurring on the "narrowest grounds" as the Court's ultimate holding. Applying this rule to the *Barnes* case, we agree with the court of appeals in Mentzel that Justice Souter's concurring opinion constitutes the holding of the United States Supreme Court in *Barnes*. *See Mentzel*, 195 Wis.2d at 326; *see also Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). Accordingly, we move to an overbreadth examination of the Town of Trenton Ordinance.

¶ 14. The First Amendment is accorded special protection in our federal constitutional framework. *See*, *e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965), quoted in *Osborne v. Ohio*, 495 U.S. 103, 137 n.12 (1990). Where an otherwise appropriate content-neutral regulation is promulgated in an overly expansive fashion, it may have the collateral effect of chilling constitutionally protected expression or allowing selective enforcement that may discriminate against certain classes of people. Those unintended results are constitutionally intolerable. *See* Id.;

Richard R. Fallon, *Making Sense of Overbreadth*, 100 Yale L. J. 853, 867 (991).

¶ 15. In such cases, the overbreadth doctrine serves to protect third parties' First Amendment rights. *See Bachowski v. Salamone*, 139 Wis.2d 397, 411, 407 N.W.2d 533 (1987). The overbreadth doctrine operates to render facially unconstitutional statutes or ordinances that "threaten[] others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared . . . invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *see also City of Milwaukee v. Wroten*, 160 Wis.2d 207, 226, 466 N.W.2d 861 (1991).

¶ 16. Under this doctrine, a party whose own speech or conduct may be legitimately regulated by a statute or ordinance, or whose speech is not subject to constitutional protections, may assert a facial challenge to an ordinance that on its face encompasses protected speech or conduct of third parties. *See Wroten*, 160 Wis.2d at 227; *see also City of Milwaukee v. Nelson*, 149 Wis.2d 434, 451-52, 439 N.W.2d 562 (1989). The overbreadth doctrine "establishes an exception to the general rule that 'a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others.'" *Thiel*, 183 Wis.2d at 520 (quoting *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989)).

¶ 17. In assessing this challenge, the court may consider hypothetical situations in which the statute or ordinance might reach too far. *See Brandmiller v. Arreola*, 199 Wis.2d 528, 547, 544 N.W.2d 894 (1996). However, the court must be cognizant of the fact that application of the overbreadth doctrine is "strong medicine," to be used only where the alleged overbreadth of the statute or ordinance is not only real, but substantial, and "then 'only as a last resort.'" *See New York v. Ferber*, 458 U.S. 747, 769-70 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973)); *see also Thiel*, 183 Wis.2d at 520; *City of Milwaukee v. K.F.*, 145 Wis.2d 24, 40, 426 N.W.2d 329 (1988).

¶ 18. Accordingly, courts must apply a limiting construction to a statute, if available, that will eliminate the statute's overreach, while still "maintain[ing] the legislation's constitutional integrity." *Thiel*, 183 Wis.2d at 521; *see Broadrick*, 413 U.S. at 613. Alternatively, a court may sever that portion of the statute which leads to overbreadth, leaving the statute as modified in full effect. *See Thiel*, 183 Wis.2d at 520.

¶ 19. Because we determine that Justice Souter's concurrence in *Barnes* is the holding of the Court, we conduct our overbreadth analysis by inquiring whether the Ordinance is drafted in a manner that addresses the secondary effects of adult entertainment, such as prostitution, sexual assault, and other criminal activity,

without also suffocating other protected expression in a real and substantial manner. We first examine the language of the Ordinance on its face. If we determine that it is overbroad, we then consider possible constructions of the Ordinance that may save it. After conducting this inquiry, we find that the anti-public nudity Ordinance encompasses expressive activities that do not implicate the "secondary effects" that the Town may legitimately seek to regulate.[fn8]

¶ 20. As the language of the Ordinance indicates, and as defense counsel was forced to concede at oral argument, several hypothetical situations exist in which the Ordinance would impinge on protected expression involving public nudity. Such examples include public exhibition of artwork or artifacts depicting nudity, public display of a television program including brief nudity, and any form of expressive live nudity that occurs in a "public licensed establishment." Such establishments include private hotel rooms, campgrounds, taverns, theaters, or any other place of business, recreation, accommodation, or amusement.

¶ 21. Such overbreadth is largely the result of the generalized terminology used by the Town when drafting the Ordinance and its specific command that portions of the Ordinance be "interpreted broadly." The Ordinance does not prohibit nude dancing – it prohibits all public nudity. The Ordinance does not limit its application to establishments licensed to sell alcohol – it applies to all

publicly licensed establishments.[fn9] The Ordinance does not limit itself to live nudity – it apparently applies to all forms of nude depiction.[fn10] Accordingly, the Ordinance regulates expressive conduct protected by the First Amendment to the United States Constitution that has no connection to the potential harmful secondary effects arising from nude dancing in liquor licensed establishments and it does so in a real and substantial manner.

¶ 22. Despite these infirmities, we are cognizant of our obligation to apply a limiting construction to the Ordinance if such a construction is available. The Town argues that the circuit court's narrow construction of the Ordinance to apply only to nude dancing in establishments licensed to sell liquor is sufficient to save the Ordinance from an overbreadth challenge. Alternatively, following the dissent in *Wroten*, the dissent would have this court rewrite the Ordinance by striking a significant portion of it and construing it "to prohibit only animate public nudity at establishments licensed by the Town of Trenton to sell alcohol." Dissent at 5.

¶ 23. We disagree that either construction is sufficient to save the Ordinance. Due to the existing structure and wording of the Ordinance, we are unable to cure the overbreadth by either striking enough of the Ordinance or providing a sufficiently narrow construction that is not flatly inconsistent with the expressed intent as set forth in its existing terms. We cannot apply a limiting construction

which contravenes the expressed intent of the Ordinance. *See Wroten*, 160 Wis.2d at 227.

¶ 24. In its attempt to save the Ordinance, the dissent engages in legal and semantic convolutions. The futility of the dissent's attempts to save the Ordinance is particularly emphasized when it negates the plain language of the Ordinance and attempts to explain that the word "showing" does not mean "displaying" or "exhibiting." Dissent at 5-6. Such an assertion defies common definition, common usage, and common sense. Yet, such an assertion is necessary for the dissent to arrive at its tortured conclusion that "showing" means "only those live acts performed by a person . . . ." Dissent at 6.

¶ 25. Similarly futile is the dissent's attempts to explain away the Ordinance's prohibition on nudity between non-family-member consenting adults in a privately rented hotel room. An exception to the Ordinance's prohibition against "public nudity at a public licensed establishment" provides in relevant part:

> This ordinance is not to be interpreted to prevent activities in rooms privately rented in a hotel . . . if the person(s) involved . . . has not invited or allowed members of the public, who are not immediate family members, to be at such location.

As long as you are an "immediate family member" this Ordinance does not apply to prevent activities in rooms privately rented in a hotel. The dissent rewrites the clause, and adds a qualification that contravenes the express language of the Ordinance, indicating that "'public nudity' does not include the private conduct of consenting adults in private rooms where the general public is not invited to attend or to participate in such conduct." Dissent at 7.

¶ 26. The dissent also construes the Ordinance to apply only to establishments licensed to sell liquor. Endorsing such a construction requires the dissent to strike and construe so much of the definition that little of the original definition of "public" as in "public licensed establishment," remains:

> Public means [any place of accommodation or amusement, which shall be interpreted broadly to include, but not be limited to, places of business or recreation][fn▲], hotels, motels, resorts, restaurants, taverns [licensed to serve alcohol] [and any place where accommodations, amusement, goods or services are available either free or for a consideration. Campgrounds are also included][fn▲].

Even assuming that a presumption of severability applied to an ordinance drafted by a Town Board, *see Regan v. Time*,

Inc., 468 U.S. 641, 653 (1984), the plain language of the Ordinance indicates an intent by the Town Board to apply the Ordinance in a far broader manner than acknowledged by the construed and severed interpretation of the dissent. Accordingly, severance is also improper. *See Brockett*, 472 U.S. at 506.

¶ 27. As the discussion above indicates, the proffered constructions of the Ordinance are inconsistent with the broadly drafted terms and purpose of the Ordinance. Such construction raises the specter of "judicial legislation." *Wroten*, 160 Wis.2d at 234. We decline the invitation to engage in such legislation and leave the task of writing a constitutionally permissible Ordinance to that branch of government where such power properly lies - the Town Board. *See* Id.

¶ 28. Moreover, even if the acts of construing the Ordinance and striking out such a substantive portion of the Ordinance were an acceptable use of our powers to conform the Ordinance with the Constitution, such a construction must still eliminate the constitutional infirmity of the original Ordinance. However, the ultimate narrowing construction offered by the dissent retains the same basic constitutional infirmity that plagues the Ordinance as drafted.

¶ 29. Even as narrowly construed by the dissent the Ordinance continues to bar protected expression involving

nudity that does not implicate the secondary effects associated with barroom erotic nude dancing that the Town alleges was its primary objective in creating the Ordinance. Examples of artistic expression barred by the Ordinance range from the presentation of a play involving the briefest moment of a woman exposing one breast as part of the script of the production to the hypothetical productions of "Hair" and "Equus" cited by Justice Souter in *Barnes*, or the even more revealing production "L'apres midi d' un faune" discussed by Judge Posner in *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1090 (7th Cir. 1990) (*Posner*, J. concurring), rev'd sub nom. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Thus, examples of infringement upon protected expression by the Ordinance range across the artistic gamut.

¶ 30. While acknowledging that the Ordinance as construed would still bar this protected artistic expression, the dissent continues to attack our finding of overbreadth by asserting that infringement of the First Amendment in this case would not be "real and substantial." In the dissent's view the Ordinance is not a "real and substantial" constraint since a revealing production is only one hypothetical and since there are no dinner theaters or other artistic venues in which such a performance could occur in the rural Town of Trenton.

¶ 31. In making these arguments, the dissent fails to acknowledge that, as noted above, the Ordinance as

construed by the dissent and the circuit court continues to target constitutionally protected activity and continues to bar all artistic expression involving nudity in all establishments licensed to sell liquor. The dissent's attempt to categorize and then generalize away the real-life examples highlighted by this and other courts is not only short-sighted, it allows a court to reject a valid overbreadth challenge by only considering the single type of expression affected.

¶ 32. While the construction offered by the dissent may narrow the overbreadth of the Ordinance, we believe the Ordinance as construed, barring all artistic expression involving nudity at licensed establishments, continues to target and infringe upon activities entitled to First Amendment protections in a "real and substantial" manner. This is not a case where the Ordinance's "legitimate reach dwarfs its arguably impermissible application," but rather a case where its impermissible application dwarfs the Ordinance's legitimate reach. *Ferber*, 458 U.S. at 773. This conclusion is consistent with our decisions in *City of Milwaukee v. K.F.*, *City of Milwaukee v. Nelson*, and *Brandmiller v. Arreola*.

¶ 33. Moreover, the dissent implicitly argues that because the Town of Trenton is a rural community, the effects of the Ordinance on nude artistic expression cannot seriously be taken as an infringement of First Amendment speech. Such a contention misses two important points. First, and most

importantly, the First Amendment to the United States Constitution applies universally to all communities within our borders. A violation of the First Amendment is as troubling in a small rural community as it is in a metropolitan area. Second, the primary purpose of the overbreadth doctrine is to prevent the "chilling" of First Amendment speech. As such, the doctrine protects the rights of third parties who, in the face of restrictive legislation, might refrain from exercising their First Amendment rights for fear of criminal prosecution. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Broadrick*, 413 U.S. at 612. Thus, the business demographics of the Town of Trenton, as they currently exist, are irrelevant for purposes of our inquiry.

¶ 34. The Constitution of the United States guarantees certain freedoms and this court is bound to ensure the proper application of those freedoms. While Justices may differ on the application of the law, the court's analysis of the Ordinance at issue is not and cannot be dependent upon a personal view of the propriety or morality of the activities offered at the plaintiff's establishment.

¶ 35. To provide a construction sufficiently remedial to cure the Ordinance's overbreadth, this court would essentially be required to rewrite the Ordinance in its entirety. We decline to legislate in this manner and leave it to the Town Board to enact an Ordinance that both means

what it says and comports with federal constitutional principles. The Town has failed to meet its burden in defending beyond a reasonable doubt the constitutionality of the Ordinance. Accordingly, we determine that the Ordinance is overbroad, in violation of the First Amendment to the United States Constitution, and we reverse the judgment of the circuit court.[fn11]

By the Court. – The judgment of the circuit court is reversed.

¶ 36. DONALD W. STEINMETZ, J. (Dissenting).

The majority strikes down as facially unconstitutional the Town of Trenton's Ordinance 10, which proscribes "public nudity at a public licensed establishment." In so doing, the majority misapplies well-established principles of constitutional adjudication. Because I disagree with the majority's analysis and conclusion, I dissent.

¶ 37. As the majority has shown, Ordinance 10 is, at first glance, overbroad. Unfortunately, this is where the majority's analysis effectively ends, and where its error begins. The majority concludes that Ordinance 10 is unconstitutionally overbroad because it "encompasses expressive activities that do not implicate the 'secondary effects' that the town may legitimately seek to regulate."

Majority op. at 11-12. Arriving at this legal conclusion, the majority makes two fundamental errors. First, the majority refuses to accept an available, limiting construction of Ordinance 10 which would cure any substantial overbreadth. *See State v. Thiel*, 183 Wis.2d 505, 522, 515 N.W.2d 847 (1994); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Second, despite controlling case law to the contrary, the majority concludes that the Ordinance's overbreadth is both real and substantial after conceiving of a single impermissible application of that ordinance. *See City of Milwaukee v. K.F.*, 145 Wis.2d 24, 40-41, 426 N.W.2d 329 (1988); *see also Broadrick*, 413 U.S. at 615-16; *City of Milwaukee v. Wroten*, 160 Wis.2d 207, 226-27, 466 N.W.2d 861 (1991).

¶38. The First Amendment doctrine of substantial overbreadth is a judicially-created, largely prophylactic doctrine designed to prevent the chilling of constitutionally protected expression. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L. J. 853, 855 (1991). As the majority notes, the overbreadth doctrine is a limited exception to the traditional rule of third-party standing that "a person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court." *Broadrick*, 413 U.S. at 610-11; *see also Board of Airport Comm'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04

(1985); *Thiel*, 183 Wis.2d at 520. This traditional rule of third-party standing reflects the conviction that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 610-11 (citing *Younger v. Harris*, 401 U.S. 37, 52 (1971)). Courts therefore recognize exceptions to this rule only when there exists "weighty countervailing policies." Id. at 611 (quoting *United States v. Raines*, 362 U.S. 17, 22-23 (1960)).

¶39. Because of the wide-ranging effects of the overbreadth doctrine,[fn12] a reviewing court must view the doctrine as "manifestly strong medicine" that should be employed only "sparingly, and only as a last resort." *Broadrick*, 413 U.S. at 613; *see New York v. Ferber*, 458 U.S. 747, 769 (1982); *Thiel*, 183 Wis.2d at 521; *City of Milwaukee v. Nelson*, 149 Wis.2d 434, 452, 439 N.W.2d 562 (1989). Courts, in consequence, have established two specific limitations to applying the overbreadth doctrine. First, a facial challenge to an ordinance will not succeed when a limiting construction is available to maintain the legislation's constitutional integrity. *See Thiel*, 183 Wis.2d at 521 (citing *Broadrick*, 413 U.S. at 613); *see also Fallon*, 100 Yale L. J. at 863. Second, where conduct and not merely speech is involved, courts including this one have uniformly stated that "the overbreadth of a statute or ordinance must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615 (emphasis added); *see also*

Thiel, 183 Wis.2d at 521; *Wroten*, 160 Wis.2d at 226; *K.F.*, 145 Wis.2d at 40-41; Fallon, 100 Yale L. J. at 863. The majority here briefly lists, but essentially jettisons, these well-established limitations on the overbreadth doctrine.

¶ 40. First, not only does the majority refuse to provide a narrowing construction of the Ordinance, it accepts the broadest possible construction of that ordinance. This court has a duty to interpret an ordinance, as it would a statute, by applying a limiting construction to that ordinance, if one is available, to preserve its constitutionality. *See K.F.*, 145 Wis.2d at 47. "A statute challenged as unconstitutionally overbroad can be 'cured' by means of judicial interpretation, which provides for a narrowing and validating construction of the law." *Thiel*, 183 Wis.2d at 522. While the majority states that it is "cognizant" of its obligations, it concludes that no narrowing construction is available because to provide one it "would essentially be required to rewrite the Ordinance in its entirety." Majority op. at 19.

¶ 41. Contrary to the majority's suggestion, the language of Ordinance 10 can easily be construed to preserve its constitutionality, without having to rewrite the ordinance in its entirety. The effective language of Ordinance 10 provides that "[t]here shall be no public nudity at a public licensed establishment." The majority construes this language to encompass both public and private nudity and to proscribe both animate nudity and the displaying or

exhibiting of inanimate nudes, either in pictures or sculptures. The majority's broad construction of Ordinance 10 contravenes the common sense understanding of "public nudity."

¶42. A closer "examination of the verbiage" of Ordinance 10 shows that such a broad construction is neither necessary nor warranted. *Wroten*, 160 Wis.2d at 227. Based on "the common sense meaning and purpose of the words employed" in the Ordinance, Ann M.M. v. Rob S., 176 Wis.2d 673, 679, 500 N.W.2d 649 (1993),[fn13] the court could reasonably construe the Ordinance to prohibit only animate public nudity at establishments licensed by the Town of Trenton to sell alcohol.

¶43. First, Ordinance 10 can be read to prohibit only animate nudity. The Ordinance defines the word "nudity" as "the showing or exposing" of certain parts or areas of the human anatomy "with less than a full opaque covering." Not expressly included in this definition are the acts of displaying, exhibiting, televising, sculpting, or drawing inanimate nudes. Had the Town of Trenton wished to proscribe such conduct it could have added the appropriate language to the definition of "nudity." It did not do so, and neither should we.

¶44. Although the words "showing" and "exposing" may be general and somewhat imprecise, they need not be construed to include the displaying or exhibiting of pictures

or sculptures. As used in the context of Ordinance 10, the word "show" is commonly defined as "to reveal (oneself) as in one's behavior or condition," The American Heritage Dictionary 1671 (3d ed. 1992), and the word "expose" as "to make visible" or "to make known." Id. at 646.[fn14] Applying the ordinary and accepted definitions of the words "show" and "expose," the court could reasonably construe the word "nudity," as defined by the Ordinance, as including only those live acts performed by a person to reveal or make visible certain parts of his or her anatomy. Under this definition, "nudity" does not include inanimate displays, exhibits, or programs including nude persons.

¶ 45. Second, Ordinance 10 does not prohibit nudity in all forms; it prohibits only "public nudity." The majority construes the Ordinance as prohibiting both public and private nudity, including the situation where consenting adults are nude in a private hotel room. This broad construction is inconsistent with a reasonable reading of the express language in Ordinance 10.

¶ 46. Although the word "public," as used in the context of "public nudity," is not defined by the Ordinance,[fn15] the word is commonly understood to mean "to reveal to the public a previously unknown or secret piece of information" or "participated in or attended by the people or community." Id. at 1464 (emphasis added). Applying either definition of "public" to the other defined language of the Ordinance, the phrase "public nudity" can reasonably be

construed to include only a person's act or acts which reveal to the members of the general public his or her nude body, or specified parts or areas thereof. Under this available construction, "public nudity" does not include the private conduct of consenting adults in private rooms where the general public is not invited or allowed to attend or participate in such conduct.

¶ 47. This construction of "public nudity" is supported by the language found in both Exceptions A and B of the Ordinance. Under the direction of Exception A, a court is precluded from construing Ordinance 10 to restrict the proper use of a public bathroom unless that room is used for "any sexual or exhibitionist purpose to or in front of or adjacent to other persons." (emphasis added). Similarly, Exception B specifically directs that the Ordinance is not to be interpreted to prevent activities in a privately owned or rented room if the person owning or renting that room "has not invited or allowed members of the public, who are not immediate family members, to be at such location." Although not perfectly drafted,[fn16] the language of Exceptions A and B of the Ordinance evince the Town's intent not to prohibit private conduct by consenting adults in private rooms unless members of the public are invited or allowed to attend or participate in such conduct.

¶ 48. Third, Ordinance 10 does not reach all animate public nudity; it prohibits such nudity only at "public licensed establishments." The majority is correct in stating

that the Ordinance does not specifically limit such establishments to places of accommodation or amusement licensed to sell alcohol. To be consistent with the language and purpose of Ordinance 10, however, the court should construe Ordinance 10 to reach only establishments licensed to sell alcohol.

¶ 49. Ordinance 10 applies only to a "licensed establishment." The only license to which the Ordinance specifically refers is the license to sell alcohol, which the Town is authorized to issue and regulate under Wis. Stat. § 125.10. The record does not describe any other type of establishment licensed by the Town of Trenton. In addition, the Town concedes that the purpose of enacting Ordinance 10 was not to protect its community from the secondary effects usually associated with adult entertainment establishments; the purpose was to protect against such secondary effects only as they are enhanced by the sale and consumption of alcohol. That this is the limited purpose of Ordinance 10 is supported by the facts in this case. During this litigation, the Town has continued to allow the Petitioner to offer at its public establishment nude and semi-nude dancing, as long as the Petitioner does not also serve or sell alcoholic beverages at that establishment. In light of the language, purpose, and the Town's enforcement of Ordinance 10, the court could reasonably construe the Ordinance to reach only establishments licensed to sell alcohol.

¶ 50. In short, the court can and should construe Ordinance 10 as prohibiting only animate public nudity at establishments licensed by the Town to sell alcohol. Adopting this narrow construction would eliminate most of the concerns raised in the hypothetical situations posed by the majority and by individual justices during oral arguments. Under this construction, Ordinance 10 would not prohibit two non-related adults from being nude in the privacy of an art studio, a hotel room, or any other private room; nor would it prevent "Joe's Tap" from hanging a picture of a playmate on its wall; nor would it prohibit the "public exhibition of artwork or artifacts depicting nudity" or the "public display of a television program including brief nudity." Majority op. at 12.

¶ 51. I recognize that the construction offered in this dissent is not the only possible construction of the language in Ordinance 10. It is, however, an available common sense reading of that language. It is not the duty of this court to point out technical flaws in an ordinance or to strike an ordinance due to its imprecise language. Rather, this court has a duty to provide a narrowing construction of an ordinance if one is available. *See Thiel*, 183 Wis.2d at 521. In this case one is available.

¶ 52. To bolster its broad reading of Ordinance 10, and to attack a more narrow reading, the majority, rather than analyzing the specific language of Ordinance 10, lobs empty assertions of "futility," "semantic convolutions," and

"tortured conclusions." Majority op. at 14. In so doing the majority misconstrues the language of the Ordinance and mischaracterizes the arguments in this dissent. To clarify this dissent, it is necessary to address three such assertions cast by the majority.

¶ 53. The majority asserts that the Ordinance is overbroad largely because of its generalized terminology[fn17] and "its specific command that portions of the Ordinance be 'interpreted broadly.'" Majority op. at 12. The majority's use of the Ordinance's "specific command" is inaccurate and misleading. The clear import of the majority's reference to this specific command is to establish the Town's legislative intent that the Ordinance be interpreted broadly.[fn18] The Ordinance, however, does not direct courts to interpret all its language and provisions broadly. The Ordinance directs courts to interpret broadly only those establishments considered "place[s] of accommodation or amusement." The Ordinance does not direct courts to interpret broadly the definition of "public nudity" or "licensed establishment." Despite the majority's assertion, the Ordinance does not contain a legislative "command" that its language be construed to prohibit nudity in all forms and in all public establishments.

¶ 54. The majority next states that this dissent "negates the plain language of the Ordinance and attempts to explain that the word 'showing' does not mean 'displaying' or 'exhibiting.'" Majority op. at 14. Again, the majority's

statement is inaccurate and misleading. This dissent nowhere states or implies that the word "showing" cannot be construed broadly to include "displaying" or "exhibiting." On the contrary, it recognizes that a number of possible constructions of Ordinance 10 exist. One available dictionary definition of "showing," however, is provided which limits the definition of "nudity" to include only animate nudity. The apparent "futility" of this argument is at least matched by the majority avoidance of the issue. The majority fails to show, as it must to support its reading of Ordinance 10, that the word "showing" can only be construed to include "displaying" and "exhibiting."

¶ 55 The majority then asserts that to limit the Ordinance's scope to establishments licensed to sell alcohol, the dissent must "strike and construe so much of the definition that little of the original definition of 'public' as used in 'public licensed establishment,' remains." Majority op. at 15. The majority then proceeds through an exercise of striking and inserting language into the Ordinance's definition of the term "public." The majority's creation and immediate destruction of this straw man argument is inaccurate and misleading. Despite the majority's assertion, this dissent does not suggest that Ordinance 10 does not apply to all "public licensed establishments." Rather, it argues only that the term "licensed establishments" can be construed to include all "public establishments," as defined by the Ordinance, that are licensed to sell alcohol. This dissent does not attempt to limit "public" establishments to

"hotels, motels, resorts, restaurants, taverns, [licensed to serve alcohol]." Majority op. at 15.

¶ 56. Given this court's duty to find an ordinance constitutional if at all possible, it is unfortunate that the majority rests on an analysis as superficial as its reading of the Ordinance. Before admonishing the Town of Trenton to enact an ordinance that "means what it says," the majority should first read what it said.

¶ 57. Second, the majority, after conceiving a single impermissible application of the Ordinance, concludes that the overbreadth of the Ordinance is both real and substantial. This court has traditionally held that only a statute that is substantially overbroad may be invalidated on its face. *See Thiel*, 183 Wis.2d at 521; *Wroten*, 160 Wis.2d at 226; *Nelson*, 149 Wis.2d at 451; *K.F.*, 145 Wis.2d at 40-41; *State v. Princess Cinema of Milwaukee*, 96 Wis.2d 646, 656, 292 N.W.2d 807 (1980). Although this court has not defined the term "substantially overbroad," it has instructed that in a facial challenge to a law, the court's first task is "to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *K.F.*, 145 Wis.2d at 41 (quoting *Houston v. Hill*, 482 U.S. 451 (1987)) (emphasis added). Similarly, the court has explained that although a court may consider hypothetical applications of a challenged ordinance, the court "will not deem a[n] . . . ordinance invalid because in some conceivable, but limited, circumstances the regulation might

be improperly applied." Id. at 40; *see also Nelson*, 149 Wis.2d at 452; *Brandmiller v. Arreola*, 199 Wis.2d 528, 546-47, 544 N.W.2d 894 (1996).

¶ 58. This requirement of substantial overbreadth is derived directly from the purpose and nature of the doctrine. *See Ferber*, 458 U.S. at 772. "[W]ithout a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." Id. at 772 n.27 (quoting Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 859 and n.61 (1970)).

¶ 59. In *Ferber*, the United States Supreme Court upheld one section of New York's criminal statutes prohibiting persons from "knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances." *Ferber*, 458 U.S. at 749. The Court upheld the regulation even though some protected expression, ranging from medical textbooks to pictorials in The National Geographic, "would fall prey to the statute." Id. at 773. The Court concluded that the impermissible applications of the statute would not amount to "more than a tiny fraction of the materials within the statute's reach." Id. Under these circumstances, the Court held that the regulation was "not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which

its sanctions, assertedly, may not be applied." Id. at 773-74 (quoting *Broadrick*, 413 U.S. at 615-16).

¶ 60. Similarly, in *Broadrick*, the Court upheld a section of an Oklahoma law restricting the political activities of the state's civil servants. The Court recognized that the challenged law would prohibit covered employees from wearing political buttons and from displaying political bumper stickers on their vehicles. *See Broadrick*, 413 U.S. at 618. Although it acknowledged that such restrictions were impermissible, the Court concluded that the law need not be "discarded in toto because some person's arguably protected conduct may or may not be caught or chilled by the statute." Id.

¶ 61. A regulation, therefore, should not be invalidated in toto for overbreadth unless it reaches "a substantial number of impermissible applications . . . ." *Ferber*, 458 U.S. at 771 (emphasis added). Simply conceiving of a single impermissible application of an ordinance is not sufficient to succeed on an overbreadth claim. *See K.F.*, 145 Wis.2d at 41 (quoting *Hill*, 482 U.S. 451); *see also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

¶ 62. For the purposes of this analysis, this dissent assumes, as does the majority, that the Town of Trenton has a legitimate, substantial interest in protecting its community from the harmful secondary effects associated

with adult entertainment establishments. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581-84 (1991) (Souter, J., concurring); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In its overbreadth analysis, the court must therefore accept that the Town of Trenton can legitimately proscribe public nudity at adult entertainment establishments. *See Barnes*, 501 U.S. at 572 (1990); Id. at 580-81 (Scalia, J., concurring); Id. at 587 (Souter, J., concurring). Accordingly, whether the overbreadth of Ordinance 10 is substantial as well as real must be judged in relation to the "plainly legitimate sweep" upheld in *Barnes*. *Broadrick*, 413 U.S. at 615; *see also Wroten*, 160 Wis.2d at 226; *K.F.*, 145 Wis.2d at 40-41.

¶ 63. As explained above, a narrow construction of Ordinance 10 would eliminate a number of hypothetical examples listed by the majority. If Ordinance 10 is construed to prohibit only animate public nudity, it would not chill the public exhibition of artwork or artifacts depicting nudity, or the public display of a television program including brief nudity. *See* majority op. at 12. Stripped of these arguably illegitimate applications, the majority is left with just one hypothetical situation upon which to conclude that Ordinance 10 is substantially overbroad. The majority argues that even under a narrow construction the Ordinance could be used to prohibit live artistic performances that do not implicate the secondary effects associated with barroom erotic nude dancing. Majority op. at 16. As this dissent has shown, simply

conceiving of this single impermissible application of Ordinance 10 is not a sufficient basis upon which to invalidate the Ordinance. *See K.F.*, 145 Wis.2d at 41; *see also Brandmiller*, 199 Wis.2d at 546-47; *Nelson*, 149 Wis.2d at 452.[fn19]

¶ 64. Even if the court decides here for the first time that one hypothetical application of an ordinance can result in substantial overbreadth, the majority's analysis fails. The last hypothetical situation posed by the majority is far from substantial. In effect, the majority invalidates Ordinance 10 in toto because a ballet troupe or other group someday may offer in the Town of Trenton Diaghilev's L'apres midi d'un faune (1912) or a similar performance including nudity. *See* majority op. at 17. In concluding that this single hypothetical is both real and substantial, the majority ignores the very limited reach of the Ordinance.

¶ 65. The deterrent effect and any overbreadth of Ordinance 10 is necessarily limited to its reach. "While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *Ferber*, 458 U.S. at 772. Ordinance 10 does not deny absolutely the right of Trenton residents to attend, or the right of artists to offer, artistic performances involving live nudity. Ordinance 10 only prohibits a performer from appearing in a state of "nudity,"

as defined in the Ordinance, during an artistic performance at an establishment licensed by the Town of Trenton to sell alcohol. The Ordinance, therefore, does not bar performances involving nudity at theaters, performing arts centers, auditoriums, or other establishments as long as those establishments do not serve or sell alcohol. Perhaps I am wrong in my estimation of how often a ballet troupe or other group will perform in the nude at a tavern in the Town of Trenton, but I think it is fair to say that the legitimate scope of Ordinance 10 vastly exceeds the illegitimate.

¶ 66. Contrary to the conclusion of the majority, any real and substantial overbreadth in Ordinance 10 can be cured by means of a narrowing judicial construction of its language. *See Thiel*, 183 Wis.2d at 522. Whatever overbreadth remains after this narrowing construction "should be addressed through case-by-case analysis of the fact situations to which its sanctions, assertedly, may be applied." *Broadrick*, 413 U.S. at 615-16. The majority has here employed the doctrine of substantial overbreadth superficially rather than sparingly and has swallowed it as an easy fix rather than as manifestly strong medicine. I therefore dissent.

¶ 67. As to the issue of overbreadth, I would affirm the judgment of the circuit court for Pierce County.[fn20]

¶ 68. I am authorized to state that Justice Jon P. Wilcox

joins this dissenting opinion.

[fn▲] [EDITORS' NOTE: THE TEXT CONTAINED WITHIN THE BRACKETS WAS STRICKEN THROUGH IN THE ORIGINAL TEXT.]

[fn1] Unless otherwise noted, all future statutory references are to the 1995-96 volumes.

[fn2] Circuit court for Pierce County, Robert W. Wing, Judge.

[fn3] Town of Trenton Ordinance No. 10 states:

AUTHORITY: This ordinance is enacted pursuant to power granted by virtue of present Wisconsin Statutes, including Section 125.10.

RESTRICTIONS: There shall be no public nudity at a public licensed establishment.

DEFINITION: Nudity means the showing or exposing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.

Public means any place of accommodation or amusement,

which shall be interpreted broadly to include, but not be limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns and any place where accommodations, amusement, goods or services are available either free or for a consideration. Campgrounds are also included.

Exceptions.

A. This ordinance is not to be interpreted as restricting the proper use of a bathroom facility by a male or female in an enclosed area where the person is of the same sex designated for such room, and is not engaged in for any sexual or exhibitionist purpose to or in front of or adjacent to other persons.

B. This ordinance is not to be interpreted to prevent activities in rooms privately rented in a hotel, motel, resort, or camper if at a campground, if the person(s) involved rented such private facility or owns it and has not invited or allowed members of the public, who are not immediate family members, to be at such location.

VIOLATION. Each violation of this ordinance shall result in a forfeiture . . . . [V]iolation constitutes sufficient grounds for board consideration of license suspension, revocation, or nonrenewal where such violation occurred in conjunction with or related to the activity licensed for.

[fn4] Lounge Management also claimed that the Ordinance was void for vagueness. The circuit court denied the claim and Lounge Management does not appeal that portion of the circuit court's ruling.

[fn5] The Town's motion to dismiss was supported with material beyond the four corners of the complaint. Accordingly, while we use the terms in the record, the motion is more properly classified as one for summary judgment.

[fn6] Wis. Stat. 893.80 states:

> (1) . . . [N]o action may be brought or maintained against any . . . governmental subdivision . . . or agency thereof . . . unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision . . . . Failure to give the requisite notice shall not bar action on the claim if the . . . subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not

> been prejudicial to the defendant . . . subdivision or agency . . . .

[fn7] Because we find the Ordinance unconstitutional as violative of the First Amendment of the United States Constitution, we need not address Lounge Management's failure to file a notice of claim on the state constitutional challenge.

[fn8] We find the Town's reliance upon the court of appeals decision in *Schultz* misplaced. *Schultz* determined that *Barnes* was "not dispositive" because it "was not a Twenty-first Amendment case." *Schultz v. Village of Cumberland*, 195 Wis.2d 554, 566, 536 N.W.2d 192 (Ct. App. 1995). While this distinction may have deserved some weight in the past, *see City of Newport v. Iacobucci*, 479 U.S. 92 (1986), the United States Supreme Court has recently held that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

[fn9] "Public licensed establishment" is an otherwise undefined term that when interpreted in the context of campgrounds, hotels, and restaurants raises a host of possible licensing requirements.

[fn10] The dissent asserts that we construe the Ordinance

"to encompass both public and private nudity and to proscribe both animate nudity and the displaying or exhibiting of inanimate nudes, either in pictures or sculptures." Dissent at 4. The dissent then asserts that "[t]he majority's broad construction of Ordinance 10 contravenes the common sense understanding of 'public nudity.'" Id. As counsel for the Town conceded at oral argument, the plain language of the ordinance could be interpreted in just such a manner to apply to inanimate nudity. Moreover, the dissent's statement confuses the order of overbreadth analysis. We first examine the Ordinance as it is written and only then attempt to construe the Ordinance to save it.

[fn11] Having determined that the Ordinance is facially overbroad, we need not address the question of whether the Ordinance is constitutional as applied.

[fn12] As the United States Supreme Court has explained, the consequence of our departing from traditional rules of standing in the First Amendment area is that any enforcement of a challenged statute may be totally forbidden, "not because [the litigants'] own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

[fn13] The court's task in this case is no different than in construing any statute; the court must apply the ordinary and approved definitions of the language used by the Town "to find the common sense meaning and purpose of the words employed" in Ordinance 10. Ann M.M. v. Rob S., 176 Wis.2d 673, 679, 500 N.W.2d 649 (1993).

[fn14] In the absence of statutory definitions, this court construes all words "according to their common and approved usage[,]" which may be established by dictionary definitions. *See Swatek v. County of Dane*, 192 Wis.2d 47, 61, 531 N.W.2d 45 (1995) (quoting *State v. Gilbert*, 115 Wis.2d 371, 377-78, 340 N.W.2d 511 (1983)).

[fn15] The Ordinance does define the word "public" in the context of a "public licensed establishment." The definition offered, however, could not reasonably apply to the phrase "public nudity." Since it is a basic rule of statutory construction that courts give effect to every word of a statute so that no portion of the statute is rendered superfluous, *see Lake City v. City of Mequon*, 207 Wis.2d 156, 162, 558 N.W.2d 100 (1997), this court must give effect to the word "public" as used in the context of "public nudity."

[fn16] As counsel for the Respondent conceded at oral argument before this court, the language "who are not immediate family members" in Exception B adds some ambiguity to the scope of the Ordinance. Read in the

specific context of Exception B, however, the purpose of this language is clear. The language qualifies only the field of persons considered "members of the public." Simply because immediate family members are not considered members of the public under the Ordinance, the court should not construe this language to also mean that all persons who are not immediate family members are necessarily members of the public. Under the language of Exception B, a person's fiancee, for example, need not be considered a "member of the public" simply because he or she is not an immediate family member.

[fn17] The majority avoids any mention or analysis of the specific terms in the Ordinance that it considers so general as to cause the Ordinance to be overbroad. By refusing to focus on the specific language of the Ordinance, the majority evades the analysis that would uncover the flaw in its conclusion. The analysis the majority goes out of its way to avoid is really quite simple. Ordinance 10 prohibits "public nudity at a public licensed establishment." In finding the language of Ordinance 10 overbroad, the majority construes "nudity" to include the display and exhibit of artwork and artifacts; it construes "public nudity" to include private nudity; and it construes "licensed establishments" to include establishments other than those licensed to sell alcohol. Although I agree that the Ordinance could be construed this way, I do not accept the majority's position that a more narrow construction is somehow "tortured."

[fn18] *See* majority op. at 14 (stating "[w]e cannot apply a limiting construction of which contravenes the expressed intent of the Ordinance."); Id. at 15-16 (stating "the plain language of the Ordinance indicates an intent by the Town Board to apply the Ordinance in a far broader manner than acknowledged by the construed and severed interpretation of the dissent."); Id. at 16 (stating "the proffered constructions of the Ordinance are inconsistent with the broadly drafted terms and the purpose of the Ordinance.").

[fn19] To avoid the controlling authority of *City of Milwaukee v. K.F.*, 145 Wis.2d 24, 40-41, 426 N.W.2d 329 (1988); *City of Milwaukee v. Nelson*, 149 Wis.2d 434, 452, 439 N.W.2d 562 (1989); and *Brandmiller v. Arreola*, 199 Wis.2d 528, 546-47, 544 N.W.2d 894 (1996), the majority counts each play, musical, and ballet to which the Ordinance someday may be applied as a separate impermissible application of that Ordinance. If this is the proper test under the substantial overbreadth doctrine, the United States Supreme Court clearly erred in *Broadrick*, 413 U.S. 601, by upholding the Oklahoma statute without first counting each political button, bumper sticker, and souvenir potentially affected by that statute. Similarly, it must have been an oversight that the Court in *New York v. Ferber*, 458 U.S. 747, 769 (1982), upheld the New York statute without first counting each magazine, pictorial, and textbook that could fall prey to that statute. The majority would have us believe that a town like Trenton cannot proscribe live nude dancing in its taverns if the performers

also recite Shakespeare, play the trombone, or pirouette as they show their breasts, genitals, and buttocks to the audience. Such performances would certainly fall within the majority's "artistic gamut." Rather than strike the Ordinance in its entirety, the court should consider the application of the Ordinance to such performances on a case-by-case basis. No matter how creatively the majority counts, the application of the Ordinance to live nude performances at establishments licensed to sell alcohol yields but a single hypothetical application of that Ordinance.

[fn20] By striking as facially overbroad the Town of Trenton's Ordinance 10, the majority has avoided, either by design or convenience, the tougher question presented by the case at bar: whether and to what extent the First Amendment protects nude and semi-nude, non-obscene dancing. I believe the court should have reached this issue.

APPENDIX B

No. 96-1853

IN COURT OF APPEALS OF WISCONSIN
DISTRICT III

LOUNGE MANAGEMENT, LTD.,

Plaintiff-Appellant,

v.

TOWN OF TRENTON,

Defendant-Respondent.

CERTIFICATION BY COURT OF APPEALS
OF WISCONSIN

Before LaRocque, Myse and Madden, JJ.

Pursuant to RULE 809.61, STATS., this court

certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

The issue is whether a municipal ordinance banning public nudity in establishments licensed for sale of liquor is overbroad and thereby an unconstitutional abridgement of speech under the First Amendment. Two prior decisions of the Wisconsin Court of Appeals have addressed public nudity ordinances, reaching opposite conclusions, arguably upon inconsistent interpretations of a decision of the United States Supreme Court.

The plaintiff in this lawsuit operates a nightclub in Pierce County, Wisconsin, and seeks to "showcase non-obscene nude and semi-nude performers in the club." The Town of Trenton in Pierce County has adopted an

ordinance that declares: "There shall be no public nudity at a public licensed establishment." Plaintiff's motion for a preliminary injunction enjoining enforcement of the ordinance was denied by the circuit court. The court then granted the Town a summary judgment declaring the ordinance was not in violation of the First Amendment.

The generally accepted analysis of a claim that prohibited conduct deserves First Amendment protection on grounds that it constitutes "symbolic speech" is set forth in ***United States v. O'Brien,*** 391 U.S. 367 (1968). ***O'Brien*** rejected a First Amendment challenge to a federal statute that criminalized draft card burning by a person seeking to influence others to adopt his antiwar beliefs. ***O'Brien*** employs a four-part inquiry, and asks whether: (1) the government regulation is within the constitutional power of

the government; (2) the regulation furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the regulation is narrowly tailored. ***Id.*** at 377.

Some years after, the United States Supreme Court applied the ***O'Brien*** test to a challenge to the State of Indiana's "public decency" law barring complete nudity in public places. ***Barnes v. Glen Theatre,*** 501 U.S. 560 (1991). ***Barnes,*** however, as a blueprint for resolving the First Amendment issue is blurred by its separate opinions: a three-justice plurality, two concurrences and four dissenters.

Chief Justice Rehnquist delivered the plurality opinion. As is true in the case before us now, there was no serious challenge to the government's power to regulate. In

applying ***O'Brien's*** second prong, the plurality decided that the important government interest furthered by the statute is the protection of public order and morality. ***Barnes,*** 501 U.S. at 569. Further, the plurality states, this interest is unrelated to suppression of free speech, and is aimed solely at public nudity. ***Id.*** at 570. Finally, the plurality concludes, the Indiana statute is sufficiently narrowly tailored so as to be no greater than is essential to the furtherance of that government interest. ***Id.*** at 571-72.

Justice Scalia concurred in the result but on different grounds. He concluded that as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all. ***Id.*** at 572.

Justice Souter, making up the five-member majority upholding the law, also concurred. He, however, in

considering what important government interest was at stake, did not rely upon the legislative concern for community morality. Rather, he recognized the government's desire to prevent the pernicious secondary effects of live nude dancing: the deterioration of neighborhoods and criminal activity, especially prostitution. ***Id.*** at 582-85. With that interest in mind, Justice Souter declared that the Indiana ban on public nudity is not inherently related to expression, but only at combating prostitution and other criminal activity. ***Id.*** at 585. In light of his declaration, he concluded that the fourth ***O'Brien*** condition, that the restriction be no greater than is essential to further the government interest, "requires little discussion." ***Barnes,*** 501 U.S. at 587. His opinion that the Indiana statute law was sufficiently narrow observed that

the requirement of pasties and a G-string was only a most moderate restriction upon free expression:

> Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message. Nor, so far as we are told, is the dancer or her employer limited by anything short of obscenity laws from expressing an erotic message by articulate speech or representational means ....

Id. at 587.

The Wisconsin Court of Appeals has had two prior occasions to interpret ***Barnes***. These cases, decided within two weeks of each other, are ***Fond du Lac County v. Mentzel,*** 195 Wis.2d 313, 536 N.W.2d 160 (Ct. App. 1995), filed June 14, 1995, and ***Schultz v. City of Cumberland,*** 195 Wis.2d 554, 574, 536 N.W.2d 192, 200 (Ct. App. 1995) (Myse, J., dissenting), filed June 27, 1995.

Mentzel applied ***Barnes*** to declare a Fond du Lac County ordinance banning nude dancing in licensed establishments unconstitutional. ***Schultz*** upheld a local ordinance banning nude entertainment in licensed establishments. Although ***Schultz*** decided that ***Barnes*** was not dispositive, and applied a Twenty-First Amendment analysis relating to the police power to regulate liquor, ***Schultz*** nevertheless includes an analysis of the holding of ***Barnes*** different from and likely in conflict with ***Mentzel***.

Mentzel begins with the premise that the ***Barnes*** holding cannot be the three justice plurality opinion, but must be found in the concurring opinion of Justice Souter. ***Mentzel*** arrived at this premise by using the so-called "***Marks*** rule." ***Mentzel***, 195 Wis.2d at 325-26, 536 N.W.2d at 165. ***Marks v. United States***, 430 U.S. 188

(1977), declared that when the Supreme Court issues a fractured plurality decision, the opinion of the Justice concurring in the judgment on the "narrowest grounds" should be regarded as the Court's holding. ***Id.*** at 193. Thus, ***Mentzel*** turned to Justice Souter's concurrence to find the holding of ***Barnes***. ***Mentzel***, 195 Wis.2d at 326, 536 N.W.2d at 165.

Mentzel then concluded that because the "plain reading of the ordinance reveals that many other forms of unclothed entertainment that do not effectuate secondary concerns would be subject to the ordinance," it violates the First Amendment. ***Id.*** at 326, 536 N.W.2d at 165. The ordinance, it concluded, would unconstitutionally restrict many forms of expression that are protected, including, by way of example, a nude modern dance by the New York

City Ballet. *Id.*

This court decided *Schultz* almost simultaneously with *Mentzel*. In *Schultz*, we upheld a city ordinance that banned nude performances on premises licensed to sell liquor. *Schultz*, however, discusses *Barnes*, including Justice Souter's concurrence, in a different light from that of *Mentzel*.

There are several concerns that arise when considering these two published decisions of this court. First, *Schultz* decided that the dispositive factor was the application of the Twenty-First Amendment to establishments licensed to sell liquor. In so doing, we invoked several decisions of the United States Supreme Court and others broadly interpreting the Twenty-First Amendment's grant of state police powers to regulate traffic

in intoxicating liquors. Lounge Management now contends that more recent decisions of the highest court, most notably ***44 Liquormart, Inc. v. Rhode Island***, 116 S.Ct. 1495 (1996), effectively overturns the holding of ***Schultz***. ***44 Liquormart*** rejected Rhode Island's reliance upon the Twenty-First Amendment to enact laws abridging commercial speech in advertising of liquor. ***Id.*** at 1501. In so doing, the Supreme Court overruled language in several previous cases suggesting that the Twenty-First Amendment increased a state's power to restrict First Amendment rights. Second, apart from the question of the viability of ***Schultz*** in light of ***44 Liquormart***, ***Schultz*** gives a broader reading of the holding in ***Barnes*** than is consistent with ***Mentzel***.

Finally, comments by counsel at oral argument in

Schultz, as well as reports of prosecutions in state news reports, suggest that local ordinances banning public nudity are widespread in Wisconsin. In light of *Cook v. Cook,* No. 95-1963 (Wis. Mar. 19, 1997), declaring an absence of power of this court to overrule, modify or withdraw language from previously published decisions, we certify this matter for further consideration.[1]

---

[1] The Town raises a separate issue challenging the failure to serve a notice of claim and notice of injury pursuant to § 893.80, STATS. The circuit court ruled that the Town had waived this issue. In any case, *Felder v. Casey,* 487 U.S. 131 (1988), bars the application of the notice of claim statute to claims made pursuant to the United States Constitution. Lounge Management includes a claim that the ordinance in this case violates the First Amendment, and any failure to comply with the notice statute is therefore not dispositive.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT - PIERCE COUNTY

LOUNGE MANAGEMENT, LTD.
RICHARD HOLST, AGENT
W5034 190TH AVENUE
MAIDEN ROCK, WI 54750

PLAINTIFF.

Case No.: 96-CV-8
Case Code: 30701/30704
Case Type: Declaratory Judgment/
Other Injunction Or Restraining Order

v.

TOWN OF TRENTON
W7926 250TH STREET
HAGER CITY, WI 54014

DEFENDANT.

FINDINGS, ORDER AND JUDGMENT

The above-entitled matter came on for hearing on Monday, May 6, 1996, at 9:30 a.m., before the Honorable Robert W. Wing presiding, pursuant to the motion of the defendant, Town of Trenton, to dismiss the plaintiff's Complaint.

Catherine R. Quiggle appeared on behalf of the defendant, Town of Trenton and Matthew A. Biegert appeared on behalf of the plaintiff, Lounge Management, Ltd.

FINDINGS

Based upon all the files, records and proceedings herein, including the hearing and record related to the plaintiff's earlier motion for a temporary injunction, the Court finds as follows:

1. Failure to comply with notice requirements

of Wis. Stat. §893.80 is a defense related to personal jurisdiction and is deemed waived by the defendant's failure to raise it in its original answer to the plaintiff's Complaint;

2. Trenton Town Ordinance No. 10 is constitutional;

3. The plaintiff's claim is not frivolous under Wis. Stat. §814.025.

Based upon the above-findings the Court orders as follows:

ORDER

1. Trenton Town Ordinance No. 10 is declared to be constitutional.

2. The Court denies the plaintiff's request for injunctive relief restraining enforcement of Trenton Ordinance No. 10.

3. The defendant's motion for costs and reasonable attorneys fees under Wis. Stat. §814.025 is denied.

JUDGMENT

For the reasons stated above, the Court hereby denies the relief requested in the plaintiff's Complaint.

Dated this 14th day of May, 1996.

BY THE COURT:

_____

Honorable Robert W. Wing
Circuit Court Judge
Pierce County, Wisconsin

APPENDIX D

TOWN OF TRENTON

Hager City, Wisconsin 54014

ORDINANCE NO. 10

The Town of Trenton, Pierce County, does ordain as follows:

AUTHORITY. This ordinance is enacted pursuant to power granted by virtue of present Wisconsin Statutes, including Section 125.10.

RESTRICTIONS. There shall be no public nudity at a public licensed establishment.

DEFINITION.

Nudity means the showing or exposing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.

Public means any place of accommodation

or amusement, which shall be interpreted broadly to include, but not be limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns and any place where accommodations, amusement, goods or services are available either free or for a consideration. Campgrounds are also included.

Exceptions.

A. This ordinance is not to be interpreted as restricting the proper use of a bathroom facility by a male or female in an enclosed area where the person is of the same sex designated for such room, and is not engaged in for any sexual or exhibitionist purpose to or in front of or adjacent to other persons.

B. This ordinance is not to be interpreted to prevent activities in rooms privately rented in a hotel, motel, resort, or camper if at a campground, if the person(s) involved rented such private facility or owns it and has not invited or allowed members of the public, who are not immediate family members, to be at such location.

VIOLATION. Each violation of this ordinance shall result in a forfeiture of not less than $500.00 nor more than $1,000.00. When using a citation form of enforcement, the

deposit allowed shall be $500.00 for the first offense, or $1,000.00 for a second or greater offense within five years. Pursuant to procedures set forth in Wisconsin Statutes 125.12, or town ordinance, violation constitutes sufficient grounds for board consideration of license suspension, revocation, or nonrenewal where such violation occurred in conjunction with or related to the activity licensed for.

Effect. This ordinance takes effect upon passage and publication.

Dated this 9th day of April, 1992.

Donald R. Johnson
Chairman

Steven D. Thoms
Clerk

APPENDIX E

Wisconsin Statute § 125.10:

125.10 Municipal regulation. **(1)** AUTHORIZATION. Any municipality may enact regulations incorporating any part of this chapter and may prescribe additional regulations for the sale of alcohol beverages, not in conflict with this chapter. The municipality may prescribe forfeitures or license suspension or revocation for violations of any such regulations. Regulations providing forfeitures or license suspension or revocation must be adopted by ordinance.

(2) REGULATION OF UNDERAGE PERSONS. A municipality or a county may enact an ordinance regulating conduct regulated by s. 125.07(1) or (4)(a), (b) or (bm), 125.085(3)(b) or 125.09(2) only if it strictly conforms to the statutory subsection. A county ordinance enacted under this subsection does not apply within any municipality that has enacted or enacts an ordinance under this subsection.

(3) ZONING. Except as provided in ss. 125.05 and 125.68, this chapter does not affect the power of municipalities to enact or enforce zoning regulations.

(4) REGULATION OF CLOSED RETAIL PREMISES. A municipality may not prohibit the permittee, licensee, employees, salespersons, employees of wholesalers licensed under s. 125.28(1) or 125.54(1) or

service personnel from being present on premises operated under a Class "A", "Class A" or "Class C" license or under a Class "B" or "Class B" license or permit during hours when the premises are not open for business if those persons are performing job-related activities.

History: 1981 c. 79, 202; 1983 a. 74 ss. 19, 32; 1985 a. 28 ss. 5, 9; 1987 a. 168; 1989 a. 31, 253; 1991 a. 39; 1993 a. 208.

APPENDIX F

Wisconsin Statute § 125.12:

125.12 Revocations, suspensions, refusals to issue or renew. (1) REVOCATION, SUSPENSION, NONISSUANCE OR NONRENEWAL OF LICENSE. Any municipality or the department may revoke, suspend or refuse to renew any license or permit under this chapter, as provided in this section.

(2) REVOCATION OR SUSPENSION OF LICENSES BY LOCAL AUTHORITIES. (ag) *Complaint.* Any resident of a municipality issuing licenses under this chapter may file a sworn written complaint with the clerk of the municipality alleging one or more of the following about a person holding a license issued under this chapter by the municipality:

1. The person has violated this chapter or municipal regulations adopted under s. 125.10.

2. The person keeps or maintains a disorderly or riotous, indecent or improper house.

3. The person has sold or given away alcohol beverages to known habitual drunkards.

4. The person does not possess the qualifications required under this chapter to hold the license.

5. The person has been convicted of manufacturing, distributing or delivering a controlled

substance or controlled substance analog under s. 961.41(1); of possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41(1m); or of possessing, with intent to manufacture, distribute or deliver, or of manufacturing, distributing or delivering a controlled substance or controlled substance analog under a substantially similar federal law or a substantially similar law of another state.

NOTE: Subd. 5. is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93(2)(c).

6. The person knowingly allows another person, who is on the premises for which the license under this chapter is issued, to possess, with the intent to manufacture, distribute or deliver, or to manufacture, distribute or deliver a controlled substance of controlled substance analog.

(ar) *Summons.* Upon the filing of the complaint, the municipal governing body or a duly authorized committee of a city council shall issue a summons, signed by the clerk and directed to any peace officer in the municipality. The summons shall command the licensee complained of to appear before the municipal governing body or the committee on a day and place named in the summons, not less than 3 days and not more than 10 days from the date of issuance, and show cause why his or her license should not be revoked or suspended. The summons and a copy of the complaint shall be served on the licensee at least 3 days before the time at which the licensee is commanded to appear. Service shall be in the manner

provided under ch. 801 for service in civil actions in circuit court.

(b) *Procedure on hearing.* 1. If the licensee does not appear as required by the summons, the allegations of the complaint shall be taken as true and if the municipal governing body or the committee finds the allegations sufficient, the license shall be revoked. The clerk shall give notice of the revocation to the person whose license is revoked.

2. If the licensee appears as required by the summons and denies the complaint, both the complainant and the licensee may produce witnesses, cross-examine witnesses and be represented by counsel. The licensee shall be provided a written transcript of the hearing at his or her expense. If the hearing is held before the municipal governing body and the complaint is found to be true, the license shall either be suspended for not less than 10 days or more than 90 days or revoked.

3. If the hearing is held before a committee of a city council, the committee shall submit a report to the city council, including findings of fact, conclusions of law and a recommendation as to what action, if any, the city council should take with respect to the license. The committee shall provide the complainant and the licensee with a copy of the report. Either the complainant or the licensee may file an objection to the report and shall have the opportunity to present arguments supporting the objection to the city council. The city council shall determine whether the arguments shall be presented orally or in writing or both.

If the city council, after considering the committee's report and any arguments presented by the complainant or the licensee, finds the complaint to be true, or if there is no objection to a report recommending suspension or revocation, the license shall be suspended or revoked as provided under subd. 2.

4. The municipal clerk shall give notice of each suspension or revocation to the person whose license is suspended or revoked.

5. If the municipal governing body finds the complaint untrue, the proceeding shall be dismissed without cost to the accused. If the municipal governing body finds the complaint to be malicious and without probable cause, the costs shall be paid by the complainant. The municipal governing body or the committee may require the complainant to provide security for such costs before issuing the summons under par. (ar).

(c) *Effect of revocation.* When a license is revoked under this subsection, the revocation shall be recorded by the clerk and no other license issued under this chapter may be granted within 12 months of the date of revocation to the person whose license was revoked. No part of the fee paid for any license so revoked may be refunded.

(d) *Judicial review.* The action of any municipal governing body in granting or failing to grant, suspending or revoking any license, or the failure of any municipal governing body to revoke or suspend any license for good cause, may be reviewed by the circuit court for the county

in which the application for the license was issued, upon application by any applicant, licensee or resident of the municipality. The procedure on review shall be the same as in civil actions instituted in the circuit court. The person desiring review shall file pleadings, which shall be served on the municipal governing body in the manner provided in ch. 801 for service in civil actions and a copy of the pleadings shall be served on the applicant or licensee. The municipal governing body, applicant or licensee shall have 20 days to file an answer to the complaint. Following filing of the answer, the matter shall be deemed at issue and hearing may be had within 5 days, upon due notice served upon the opposing party. The hearing shall be before the court without a jury. Subpoenas for witnesses may be issued and their attendance compelled. The decision of the court shall be filed within 10 days after the hearing and a copy of the decision shall be transmitted to each of the parties. The decision shall be binding unless it is appealed to the court of appeals.

(3) REFUSALS BY LOCAL AUTHORITIES TO RENEW LICENSES. A municipality issuing licenses under this chapter may refuse to renew a license for the causes provided in sub. (2)(ag). Prior to the time for the renewal of the license, the municipal governing body or a duly authorized committee of a city council shall notify the licensee in writing of the municipality's intention not to renew the license and provide the licensee with an opportunity for a hearing. The notice shall state the reasons for the intended action. The hearing shall be conducted as

provided in sub. (2)(b) and judicial review shall be as provided in sub. (2)(d). If the hearing is held before a committee of a city council, the committee shall make a report and recommendation as provided under sub. (2)(b)3. and the city council shall follow the procedure specified under that subdivision in making its determination.

(3m) REFUSALS BY LOCAL AUTHORITIES TO ISSUE LICENSES. If a municipal governing body or duly authorized committee of a city council decides not to issue a new license under this chapter, it shall notify the applicant for the new license of the decision not to issue the license. The notice shall be in writing and state the reasons for the decision.

(4) SUSPENSION OR REVOCATION OF LICENSES ON COMPLAINT OF THE DEPARTMENT.

(ag) *Complaint.* A duly authorized employee of the department may file a complaint with the clerk of circuit court for the jurisdiction in which the premises of a person holding a license issued under this chapter is situated, alleging one or more of the following about a licensee:

1. That the licensee has violated this chapter.

2. That the licensee keeps or maintains a disorderly or riotous, indecent or improper house.

3. That the licensee has sold alcohol beverages to known habitual drunkards.

4. That the licensee has failed to maintain the premises in accordance with the standards of sanitation prescribed by the department of health and family services.

5. That the licensee has permitted known

criminals or prostitutes to loiter on the licensed premises.

6. That the licensee does not possess the qualifications required under this chapter to hold the license.

7. That the licensee has been convicted of manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41(1); of possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41(1m); or of possessing, with intent to manufacture, distribute or deliver, or of manufacturing, distributing or delivering a controlled substance or controlled substance analog under a substantially similar federal law or a substantially similar law of another state.

8. That the licensee knowingly allows another person, who is on the premises for which the license under this chapter is issued, to possess, with the intent to manufacture, distribute or deliver, or to manufacture, distribute or deliver a controlled substance of controlled substance analog.

(ar) *Summons.* Upon the filing of the complaint, the clerk of the court shall issue a summons commanding the licensee to appear before the court not less than 20 days from its date of issuance and show cause why his or her license should not be revoked or suspended. The summons and a copy of the complaint shall be served at least 20 days before the date on which the person is commanded to appear. Service shall be in the manner

provided in ch. 801 for civil actions in circuit court.

(b) *Procedure on hearing.* If the licensee does not appear as required by the summons, the allegations of the complaint shall be taken as true and if the court finds the allegations sufficient, it shall order the license either suspended for not more than 90 days or revoked. The clerk of the court shall give notice of the suspension or revocation to the person whose license is suspended or revoked. If the licensee appears and answers the complaint, the court shall fix a date for the hearing not more than 30 days after the return date of the summons. The hearing shall be had before the court without a jury. If upon the hearing the court finds the allegations of the complaint to be true, it shall order the license either suspended for not more than 90 days or revoked. If the court finds the allegations of the complaint to be untrue, the complaint shall be dismissed.

(c) *Effect of revocation or suspension.* When a license is revoked or suspended under this subsection, the clerk of court shall notify the authority which issued the license. If the license is revoked, no other license may be issued under this chapter to the person whose license was revoked or to any person related to him or her as owner, lessor, bailor or lender, within the 12 months after the date of revocation and no other license may be granted for the premises covered by the revoked license within 60 days of the date of revocation. The findings and order of the court shall be filed within 10 days after the hearing and the order shall be final unless appeal is taken to the court of appeals.

If an appeal is taken from a revocation, any period during which the order is stayed shall be added to the 12 months and 60 days, respectively. No part of the fee paid for any license which is revoked may be refunded. Whenever any court has revoked or suspended any license under this subsection, no further proceedings shall be commenced under this subsection except upon grounds arising after the original revocation or suspension.

(5) REVOCATIONS OR SUSPENSION OF, OR REFUSALS TO RENEW, PERMITS BY THE DEPARTMENT. The department may, after notice and an opportunity for hearing, revoke, suspend or refuse to renew any retail permit issued by it for the causes provided in sub. (4) and any other permit issued by it under this chapter for any violation of this chapter or ch. 139. A revocation, suspension or refusal to renew is a contested case under ch. 227.

History: 1981 c. 79; 1983 a. 516; 1987 a. 93; 1993 a. 98; 1995 a. 27 s. 9126(19); 1995 a. 417, 448; s. 13.93(2)(c).

Due process and equal protection rights of licenses discussed. Tavern League v. City of Madison, 131 W (2d) 477, 389 NW (2d) 54 (Ct. App. 1986).